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Supreme Court of the United States

OCTOBER TERM [redacted] 1969

No. 342

THE EXCHANGE NATIONAL BANK OF ATCHISON,
Petitioner,

versus

THE HIBERNIA NATIONAL BANK OF NEW ORLEANS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

M. HEPBURN MANY,
MANY, HARTMAN & LOCOCO,
Attorneys for Petitioner,
1402 American Bank Building,
New Orleans, Louisiana 70130.

Of Counsel:
JOHN M. PHILLIPS,
STINSON, MAG, THOMSON,
McEVERS & FIZZELL,
Nine West Tenth Street,
Kansas City, Missouri.

O. JOHN ROGGE,
WEISMAN, CELLER, ALLAN,
SPETT, and SHEINBERG,
1501 Broadway,
New York, N.Y. 10036.

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OPINION BELOW.

The Exchange National Bank of Atchison, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on February 13, 1969.

The only opinion rendered by the Court below is reported in 407 Fed.2d 840, copy of which is printed in Appendix A hereto.

JURISDICTION.

The judgment of the Court of Appeals affirming the judgment of the District Court of the Eastern District of Louisiana, New Orleans Division, which granted defend-

ant's motion to dismiss for failure of plaintiff to state a claim upon which relief can be granted, was entered on February 13, 1969. The jurisdiction of this Court is evoked under c.646, Act of June 25, 1948, 62 Stat. 928, 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

Only one primary question is presented:

Whether the District Court erred in finding that even where a bank knowingly permits a dishonest person to remain as one of its responsible officers, it cannot be held liable for the damages occasioned to third parties who trusted him to their detriment because of his position.

STATUTES INVOLVED.

The statutes involved are Louisiana Civil Code, Articles 2315 and 2316, which read in pertinent part as follows:

2315 "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it . . .".

2316 "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

STATEMENT OF THE CASE.

The judgment of the Court of Appeals which petitioner seeks to have this Court review affirmed the judgment of the District Court granting defendant's motion to dismiss for failure of plaintiff to state a claim on which relief can be granted, and therefore the allegations of fact in the original complaint herein must be considered as admitted.

These facts are:

1. During the years 1961, 1962 and 1963 one Wallace M. Davis, Jr. was employed as Vice-President by respondent the Hibernia National Bank of New Orleans, a national banking association legally a citizen of Louisiana.

2. In 1961 Davis engaged in illegal and improper activities in that, in violation of federal law, he accepted commissions for procuring certain loans in substantial amounts by the bank of which he was an officer to those paying the commissions.

3. Two instances of such activities were made known to defendant bank July 23, 1962.

4. Despite this knowledge, respondent continued to hold out Davis as a fully authorized and responsible Vice-President, entitled to public confidence in his integrity and trustworthiness, until the end of 1963.

5. During the year 1963, on March 20, Davis and his wife obtained a loan of $70,000.00 from petitioner, The Exchange National Bank of Atchison, a national banking association legally a citizen of Kansas.

6. In making this loan to Davis and his wife, petitioner accepted and relied on him as vice-president of respondent to be a person of honesty and integrity; and petitioner authorized and made said loan in reliance on the good character of Davis and on the strength of a financial statement submitted by Davis.

7. The financial statement in fact was false and fraudulent in material regards, and if Davis's true financial situation or his true character had been known to petitioner the loan would not have been made.

8. Petitioner did not discover the truth about Davis's behavior and respondent's knowledge of it until November of 1966.

9. Davis and his wife still owe petitioner some $50,000.00, plus attorney's fees, interest and costs.

It is petitioner's position that the loss sustained by it was directly due to respondent's improperly keeping Davis in his important and responsible office, causing and entitling petitioner to rely on him as a person of honesty and integrity to its extreme detriment, after respondent knew that he was or had become untrustworthy; and therefore, petitioner is entitled to recover from respondent the loss suffered.

REASONS FOR GRANTING THE WRIT.

Both of the Courts below, District Court and Court of Appeals, found the instant situation to be one in which respondent had no connection with petitioner—indeed, was "a complete stranger to it"—and had no responsibility and so no liability to it. But this is a dangerous oversimplification of the obligations a banking institution has in today's complex and interdependent society.

It will not do at all to say, as the Court of Appeals says, that a bank does not warrant the payment of personal debts of its employees, and therefore respondent is not liable for the loss its vice-president Davis caused petitioner. Petitioner is not seeking to recover on this basis. Petitioner is saying that when respondent, knowing this officer was dishonest and untrustworthy, continued him in his responsible position, it was acting no differently than if it had knowingly continued to endorse a false statement about the assets and liabilities of one of its clients. And in this latter situation a basis for exposure has been found. A most interesting recent case in England, *Headley Byrne & Co. v. Heller & Partners*, 3 Weekly L. R. 101 (H. L. 1963) (See 77 Harvard L. Rev. 773 (1964)) held *inter alia* that a bank may be liable for pecuniary harm resulting from negligent misrepresentation even without a contractual or fiduciary relationship, although on the facts in the matter it was found that the bank's disclaimer of responsibility in the premises prevented a duty of care from arising. This matter had to do with a credit report on one of the bank's customers which was relied on by plaintiff to its detriment. The House of Lords em-

phasized the importance of the defendant's possession of superior access to facts in generating reasonable reliance from which a duty of care would arise, and this fits to a T the situation now presented.

Petitioner concedes, as it must concede, that if it had asserted its claim in the 1920's there would have been no legal foundation for recovery. However, the past four decades have been a time of enormous changes, of the development of new business as well as technological techniques and a vastly increased economic activity. Like it or not, it is nonetheless a fact that the acts and representations of a person or corporation have a far wider range and effect than was true before. There is an ever-increasing need for accuracy and honesty, particularly by those in a fiduciary capacity, not only for the protection of those directly dealt with but also those of the large group who may rely on these representations even if they have no contractual relationship with the party making them.

To meet this problem, the law has changed and grown so that where previously a party was only liable to those with whom it dealt directly, it now has exposure to those to whom it occasions loss even though the relying third party is merely one of a class whose reliance upon the representation could reasonably have been foreseen. Starting with the landmark case of *Ultramares Corporation v. Touche*, 225 N.Y. 170, 174 N.E. 441 (1931), dealing with the responsibility of accountants, the doctrine has become well established that reckless statements, as well as deliberate falsehoods, can constitute fraud and afford basis for liability even where there is no privity. It should be noted that Justice Cardozo, the organ of the court, held that privity was not a requirement of fraud, adding that the "attack on the citadel of

privity is proceeding in these days apace." (p. 445) The extent to which this attack has been successful to date is well shown in *Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85 (R.I., April 1968), which held accountants who carelessly prepared a financial statement for a debtor liable to a creditor who relied on that statement for lending money and who was foreseen by the accountants as a potential third party who would rely, even though the creditor and the accountants were not in privity.

The requirement for privity has been eliminated where the one making a misrepresentation was a title abstractor (*Dickle v. Abstract Co.*, 89 Tenn. 431, 14 S.W. 896 (1890), and generally, see Professional Liability of Abstractors, 12 Vand. L. Rev. 783 (1959)), a notary (*Lowe v. Wright*, 40 Tenn. App. 525, 292 S.W. 2d 413 (1956)), an architect (*Los Angeles Testing Laboratory v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958)). Petitioner emphasizes that the illustrations are but part of a general thrust of the law toward an ever higher requirement, an ever larger exposure to liability for misrepresentation or concealment. Instance after instance can be cited over the whole legal spectrum, ranging from the epochal *Texas Gulf Sulphur Co.* case, 401 F. 2d 833 (1968), to the "Truth In Lending" Act, Title I of the Consumer Credit Protection Act (P.L. 90-321), 82 Stat. 146, 15 U.S.C. 1601. It is surely justice as well as good law to hold banks and bankers to the same standards.

It has already been established that a bank must select its officers with due regard to their fitness for their calling, and whenever a bank disregards obvious indications of dishonesty it exposes itself to liability. *McCarthy v. Brockton Nat. Bank*, 50 N.E. 2d 196 (Mass. 1943). What petitioner calls for here is but a few steps further on the same road.

This admittedly sets a high level of integrity for banks and banking. But it is a fact that banks do occupy a position of public trust and they do represent, as they must, that their officers are honest and trustworthy. This does not mean that they underwrite every private act that their officers do or perform. It is submitted, however, that this does mean that there is a liability on their part where they hold out an officer as being honest and trustworthy when in fact they know he is not, and his dishonesty causes loss to an innocent third party.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

M. HEPBURN MANY,
MANY, HARTMAN & LOCOCO,
Attorneys for Petitioner,
1402 American Bank Building,
New Orleans, Louisiana 70130.

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JOHN M. PHILLIPS,
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